No. 157.

Brf. of Waters for P. C.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

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ROBERT JACKSON, PLAINTIFF IN ERROR AND BELOW,

vs.

GEORGE E. EMMONS AND J. PAUL SMITH.

BRIEF FOR JACKSON, PLAINTIFF.

J. J. WATERS,
Attorney for Plaintiff.

LAW REPORTER PRINT.

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STATEMENT OF CASE, QUESTIONS, ETC.

Sec. 1. Briefly stated, this is an action for a continued trespass and injuries to the house or habitation and family of plaintiff by the unlawful blasting of rock near. The declaration shows the particulars more fully. Ps. 1 and 2, printed Record. Pleas of not guilty and limitations by defendants were filed, on which issues were joined. P. 3 Record. No demurrer was made by defendants.

Sec. 2. At the trial of the case, plaintiff testified in part that the lot of ground on which his house was belonged to Mr. Elias Travers, to which testimony defendants objected that title to land could not be proved that way, but plaintiff avoided the ill-founded objection by stating he was not going to prove title to land but to a house. Then witness said Travers let him have the lot on an unwritten agreement that he, witness, should pay $12 a year ground rent for it, and that when he had paid $500, he, Travers, would deed it to him.

Witness also testified that the house belonged to him, and that he put it there *by consent of Travers.* These facts appear in the Record through an uncontradicted affidavit for plaintiff, in connection with a motion, on ps. 7 and 8, Rec. To such evidence defendant objected on ground that it contradicted plaintiff's declaration, they claiming the house belonged by law, as part of the lot, to Mr. Travers, and could not by verbal evidence be shown to be Jacksons. This contention was sustained by the trial judge, who informed plaintiff he could not go on with the trial. So plaintiff was not allowed to give any further evidence in support of the other allegations of his declaration, although separate from the title to the house. P. 7, marg. p. 13, Record.

Sec. 3. Thereupon to avoid excepting and appealing, and to get some sort of a fair trial, plaintiff asked leave to amend his declaration, so as to avoid the court's objections, by dropping the allegation of ownership of the house, and by claiming more fully for injuries to the *occupation* of it, and as no objection was made by defendants (the amendment being in their favor), nor any demand for any conditions or costs, such *leave* was granted to amend as plaintiff might be *advised.* With this a juror in the trying panel was withdrawn, and the case continued for the term without further qualification. Ps. 8 and 4 Rec.

Sec. 4. But before plaintiff could amend, in two days after leave, defendant's filed motion to compel the plaintiff to pay all their costs as a *condition* of amending, ps. 4, marg. p. 6, Rec. This was not heard until about a month thereafter, when plaintiff was given the *leave* to amend as he might be *advised* over again, provided he paid certain costs, p. 4, Rec., end. As this was a burden *plaintiff* did not ask for, nor consent to in advance of an election, nor as a lawful requirement at such a stage in the case, it being imposed *after* the trial and leave to amend, and as the amendment was really *not necessary* to plaintiff's case, (he having a legal right to the house in question) he elected

not to amend, and fairly informed defendants thereof. Ps. 5, marg. p. 9, and 8, marg. p. 14, Rec. This induced defendants to move for the dismissal of plaintiff's suit, which was granted. Ps. 5 and 6, Rec.

Sec. 5. This was an entire surprise to the plaintiff's counsel, who did not expect his client to be summarily deprived of all chances of a fair trial for the outrageous treatment he had suffered, because he refused to exercise a leave or license to change his declaration, (which change would have solely suited defendants), when that leave had an after imposed burden attached to it against his will, which he thought by all reason, authority and justice, gave him a right to refuse to exercise such a license. And the judge himself had once conceded such a right of refusal. The attaching of a condition and burden to the leave to amend, not demanded when it was taken, operated as a snare to get plaintiff out of Court, and eventually precipitated plaintiff's case into this Honorable Court on a question of practice, (and before any ascertainment of damages by verdict) as the only resort left to get justice. Had plaintiff known he was to be treated as he was after the leave to amend, he would not have asked such leave, but would have duly excepted to the ill-founded and inconsistent (as we shall show) rulings of the trial judge, and brought his case up for review on such, especially as it would have cost but little on such a diminutive record and bill of exceptions.

If the snare in this case is to be sustained, then the same trap can be always set with success when a party offers to amend. Thus the Courts will create in reality a "juggling with justice" now wrongly charged to us in the opinion of the Court of Appeals in this case, p. 12 Rec., from which we will try to show we have justly appealed, having "just cause" for what we did "in good faith" in refusing to amend.

Sec. 6. As plaintiff's counsel was absent when the mo-

tion to dismiss his case was granted, he filed a motion to vacate the order and judgment of dismissal, and embodied the small amount of testimony at the trial, with some other things, in an affidavit, which was not denied by any contrary affidavit, in support of such motion. Ps. 6 to 8, marg. ps. 11 to 14, Rec. This affidavit was in part to refresh the mind of the Court or Judge, in an authenticated manner, as to what occurred at the trial, as no bill of exceptions in the case could be made for the situation in which plaintiff was unexpectedly placed, and there was no other approved way by plaintiff of showing the facts than by affidavit. But the justice overruled the motion, and plaintiff duly appealed from both the order of dismissal and the order refusing to vacate the same, to our Court of Appeals. Marg. ps. 15 and 16, Rec.

Sec. 7. The preceding shows how the questions following are raised in the case:

a. Can a court dismiss a party's suit because he elects not to amend his declaration, on *leave* to do so as *advised*, when the leave has a *condition* imposed on it against his will *after* the leave is granted, or is such leave a mandatory order?

b. Is a party *compelled* to exercise a *privilege* he has obtained to change his pleading, when the exercise involves compliance with an after-imposed condition which is against his will, and which he did not ask for?

c. Can a party waive a right by his silence to have conditions about amending imposed on his adversary, and then after leave to amend, have the leave clogged with a disadvantageous condition or drawback?

d. Is it correct that the ownership of a house, as separate from the ground under it, cannot be shown by parol evidence?

Our Court of Appeals quickly affirmed the judgment appealed from, in an opinion which cites no authority and which we submit, and shall try to show, is hasty and incon-

sistent, and charges plaintiff with bad faith without reason for the charge. From such we duly sued out a writ of error to this Honorable Court. Ps. 11 to 13 Rec.

ASSIGNMENT OF ERRORS, ETC.

Sec. 8. Our Court of Appeals, we submit, erred in the following instances:

1st. In affirming judgment of Supreme Court, D. C., in dismissing plaintiff's suit because he elected not to avail himself of leave to amend his declaration, when a *condition* of amending was attached *after* the leave was given, unfair to him and against his will.

2d. In affirming the judgment or order of said Supreme Court in refusing to vacate the order and judgment thereof of final dismissal, when plaintiff made proper motion and showing therefor, and in alleging (in its opinion) plaintiff acted without reasonable cause and not in good faith in exercising his option about amending his declaration, in electing not to amend, and also erred in ruling, in opinion, p. 12, Rec., that such practice could not be allowed, although the right to refuse to amend (especially when an ex post facto condition or punishment was attached after the leave) was in effect given by the trial court itself by the very terms of the leave or license, p. 4, Record, top and bottom.

3rd. In affirming judgment of trial court in allowing defendants to set up a claim for costs after unconditional leave had been granted plaintiff to amend, without objection at the time by said defendants, and also erred in ruling, in opinion, p. 12, Rec., that the requirement (after added) to pay costs with any amendment was a positive and independent order, authorized by law, which plaintiff's case could be dismissed for, if he refused to comply with it.

4th. Said Court of Appeals erred in refusing to consider the affidavit in the record, in its opinion herein, p. 12, Rec., when such affidavit, ps. 7 and 8 Rec., showed the facts as to good faith, etc., which are not shown elsewhere, and also erred in ruling or assuming that the declaration of plaintiff was defective and must be amended, p. 12, Rec., notwithstanding it appeared proper, especially in light of facts in evidence (ps. 1, 2 and 7, Rec.), and that the refusal to amend was a juggling with justice, although a condition was imposed after leave given unconditionally to amend, and when such after condition operated as a trap and an imposition on plaintiff.

Wherefore plaintiff prays a reversal of the judgment herein by said Court of Appeals, and a judgment in favor of plaintiff.

ARGUMENTS AND AUTHORITIES.

Sec. 9. The first assignment of error, which see, we submit, is well founded in common sense and law. "*Leave* to amend his declaration as *advised*," as in the orders top and close of p. 4, Rec., is the giving by the court itself of a *license* or *option*, to be used or not as plaintiff should be advised or judge best, and if done, to be done as he should judge best, of course in the limits of reason. By such leave the Court *ordered* nothing, and *directed* nothing, but counsel had to assume the responsibility of managing the *privilege* given. See 15 N. H., cited at end of this section of brief. These positions are all the more forcible when the defendants had an after condition and burden imposed on the "leave" given plaintiff, p. 4, Rec. There was no reason Jackson should cease to claim his house that was injured, except to help his case to a trial. Marg. p. 9, and top p. 8, Rec. And yet the court treats the leave given as a *mandatory* order, about which Jackson had no discretion or choice,

and finally dismisses his suit. Marg. pp. 10 and 15, Rec. That this was fatal error see—

Smith *vs.* Powers, 15 New Hamp. 546, 547, 560 and 561. Encyc. Plead. & Prac., Vol. 1, head "Amendments," p. 640, part 14 and note 11.

Sec. 10. The above complaints about the dismissal of plaintiff's suit are strengthened by the grievance, which consisted in allowing the leave to amend to be burdened with costs after the leave had been requested and granted, and the trial was ended. P. 4, Rec. Jackson might as well *appeal* as pay *such costs.* The condition was gained without his consent and against his will and just interest, as see Marg. ps. 6, 7 and 14, Rec.

This last proceeding operated as a most unjust trap to plaintiff, for had he known that he was to well pay defendants for the privilege of dropping part of his case against them, the leave to amend would not have been taken, but the rulings of the court would have been duly excepted to. As it was, the condition was added after plaintiff took the leave, the jury were discharged, and it was too late to retrace steps and to get a bill of exceptions. Such show the injustice.

Sec. 11. But we very respectfully insist that, as defendants made no demand for costs when plaintiff took leave to amend, that they waived thereby their right to any such condition, and are estopped by their silence at the time from going back afterwards to the occasion, and claiming costs as a proper condition of the leave given. Therefore, when this *ex post facto* punishment was made a condition of amending, plaintiff had a right to elect not to amend.

Smith *vs.* Powers, 15 N. H., as cited above.

Sec. 12. Defendants have no right to complain if there was no jury to direct to return a verdict for them when plaintiff elected not to amend, for such was their fault in

not asking for conditions or costs while the jury was present. And by letting the jury go before asking conditions to be attached to plaintiff's leave to amend, defendants unjustly cut off plaintiff's chance to get a bill of exceptions at the time of the court's ruling for the better preservation of his rights. The fact that plaintiff could or did refuse to amend to the *displeasure* of defendants does not alter the right to so refuse, nor does it alter the fair and natural meaning of words, and we submit courts have no right to distort words to prevent a party from doing what is disagreeable. "Leave to amend—as advised," compels nothing.

To say that the privilege to amend can be abused by repeatedly declining, in a specific case when leave is given, is utterly untenable, for none can amend without leave of a court, and if a court repeatedly allows the privilege, it makes it legal, but the court to blame.

Sec. 13. The leave to amend in this case was given under our local statute adopted from Md., (see Sec. 92, R. S. D. C.,) being act of 1785, Ch. 80, Sec. 4, (Kilty's Laws of Md., Vol. 2, as per date,) which section is as follows:

> "IV. And be it enacted, That the courts of law shall have full power and authority to order and allow amendments to be made in all proceedings whatsoever before verdict, so as to bring the merits of the question between the parties fairly to trial; and if amendment is made after the jury is sworn, a juror shall be withdrawn; and in all cases where amendments are made, the adverse party shall have time allowed him, in the discretion of the court, to prepare to support his case upon the state of the proceeding so amended, and such costs shall be allowed the party against whom such amendment may be made as the court shall think just."

Here will be seen no *compulsion* on courts to impose costs on leaves to amend, and no authority conferred to *punish* a party or to dismiss his case because he elects *not* to amend upon "leave" to do so. The dismissal must have good

ground in something else that is wrong, which the party voluntarily elects not to correct.

Sec. 954, R. S. U. S., will not sustain the lower courts in holding that they had a right to dismiss plaintiff's case because he elected not to amend when defendants had an *after* imposed condition added to the leave to amend.

Sec. 14. This honorable Court has been consistent in construing Sec. 954, R. S. U. S., as leaving amendments in the *discretion* of the trial court, unless there was a gross abuse in exercising the discretion, but our local courts are not consistent about amendments. For in Magruder *vs.* Belt, 7 App. D. C. 303, 313, amendment is stated to be a *right*, and they remanded that case to allow a plaintiff to amend to covenant when he had sued in assumpsit *purposely* to evade a sealed contract. Yet the same court has since said that amendments were in the *discretion* of the lower court, and now in this case they say a party cannot after leave refuse to amend, that it was in bad faith, and also there is no right in courts to refuse costs as a condition. Then where is the *right* in a party, or the *discretion* of the trial court? And leave to amend is repeatedly given in our courts without any costs or conditions, although often against justice, as their records show.

Sec. 15. Suppose a party discovers after leave to amend, that he can supply the necessary evidence or matter which his case at first appeared defective in, has he not a right to elect *not* to amend, and in good faith? In this present suit we expect to find that there was really a written contract about Jackson's occupation of the ground of Elias Travers; otherwise Jackson could not have been allowed to stay there so many years at a nominal rent, but Mr. Travers being dead it has not been found, and Jackson has probably forgotten it.

Sec. 16. Our second assignment of error which, see, is of course largely built upon the same reasoning as our first, for if the court was wrong, in dismissing plaintiff's case, it was

wrong in refusing to vacate that dismissal. So we will respectfully refer to sections 9 to 15 of our brief, without repeating some things, and will also refer to the affidavit (uncontradicted) on ps. 7 and 8, Record, (and to letter in marg. p. 9 of Record), in support of such assignment of error. We also duly appealed from the order refusing to vacate the previous order of dismissal and judgment, as see marg. p. 16, Record, etc.

Sec. 17. Our third assignment of error, which see, has been also partly argued in connection with our first. See sections 10 and 11 of our brief. We submit that in plain common sense, as well as in law, that if a party is present, as in this case, when a privilege is unconditionally given his opponent, without any objection on his part, he thereby waives, as he may well do, any legal right to hamper such privilege for his own advantage, and that he can not therefore, on an afterthought, have a clog imposed on his opponent, and that if he so does, his adversary may refuse in reason and good faith, to exercise the privilege, especially if it be, as was here, really an advantage only to the burthening party.

Sec. 18. And as to the order of the court allowing the amendment, that the party given leave should pay costs, such order, if good at all, was good *only* as a *condition* of the leave asked, as will be seen by the statute cited in Sec. 13 of our brief. There was no authority otherwise whatever for such an imposition. See also Sec. 954, R. S. U. S., last part. And there is no law empowering *punishment* because a party will not comply with the imposition. He can be only gotten at by the irregularities in his case, if any, which he will not correct, and which must be met in a regular and proper mode. We submit, our courts had no foundation to treat the order to pay costs in this case as an independent and positive order, which must be obeyed at all events, like some other but different orders.

Sec. 19. Our fourth assignment of error, which see, con-

cerns, for one thing, the refusal to consider the affidavit as to the trial and other things, made on behalf of plaintiff in trying to set aside the dismissal. See the affidavit on ps. 7 and 8, Record, and the opinion on p. 12, Rec. Now, how in the world was the plaintiff to inform the Court of outside facts pertinent to his complaint, or to refresh the memory of the Court as to a past occurrence, except by a written statement verified by oath? Can a bill of exceptions be had simply for the purpose of refreshing the memory of the trial Court as to what it has done on a previous occasion? We know of no such practice. Bills of exceptions are to make a record, and to show proper objections, for an *appellate* tribunal. We submit that in this present case, the affidavit is properly part of the Record and to *vindicate* the plaintiff, and that without it, the lower Court had no ground to judge of the action of the plaintiff, so as to condemn him. If they knew *nothing* about what transpired in the lower Court, they had no right to *judge* the plaintiff, and to rule against him, no right to assume the declaration of plaintiff, ps. 1, 2 and 7, Rec., was defective, and to charge that the refusal to amend was a juggling with justice, because plaintiff elected not to amend when he was tried to be thrown out of Court by unexpected charges for costs, a trap in the case, and a mode of fighting that had been tried against plaintiff before.

Sec. 20. In justice to our case we beg leave to further show that the primary mistake of the trial Court, and which affected the subsequent proceedings, was in holding that Jackson could not prove the ownership of his house apart from the land, by verbal evidence. Marg., p. 13, Rec. This unfortunately does not appear by a bill of exceptions, because we wished to avoid contention and appealing at the time, so was willing to look over that part of our case, and so took leave to amend. And when the clog of costs was after added, then the jury were gone and no bill of exceptions could be had. But what occurred is sworn to without sworn contradiction. And it seems necessary to dispose of said ruling.

Sec. 21. Jackson's ownership of his house is governed by a well developed head of the law, namely, *License*—meaning a privilege to do or procure or use something on the *real estate* of another.

This head of law is largely treated in Vol. 13, Am. & Eng. Ency. Law, Heading VI, pp. 539–557, where its extensive reach at the present day can be found. The theory on which licenses stand is largely shown in—

Miller *vs.* Auburn and Syracuse Rd. Co., 6 Hill (N. Y.), 64, 65.

Many illustrations of rights to use or remove things from or out of the land of another could be given at the present day. Some instances of rights under parol licenses can be found in—

Am. & Eng. Ency. Law, Vol 13, pp. 550–553 and notes.

Sec. 22. But Jackson's ownership of his house and parol proof of such is amply sustained by the reasoning through the case of—

Rogers *vs.* Cox, 96 Ind. 517–162.

See also Harris *vs.* Gillingham, 6 N. H. 11.

Sec. 23. Jackson's rights might be maintained under the ample head of "Fixtures" as concerns tenants and lessees, and his rights as a vendee are good in equity by—

Purcell *vs.* Miner, 4 Wall. 513.

Sec. 24. Part of the error of the lower court consisted in holding that title to real estate could only be proved in writing. There are many instances in which title is proved by verbal evidence, as in inheritance, escheat, adverse possession, dedication, estoppel, and others.

See Dickerson *vs.* Colgrove, 100 U. S. 583, 584.

Sec. 25. And before a building can be construed to be a part of another man's realty, it must be shown that it is there by his consent as part of his property, and not that he has *agreed*, in words or writing, it shall belong to another and it must be so *attached* to the land as to be reasonably a part thereof. Jackson's house is no part of the lot it is on.

Sec. 26. The court below was itself absurdly inconsistent in holding that Jackson could not prove *his* ownership of the house by parol evidence, because it was real estate and belonged in law to Travers, when the title of *Travers* was only shown by parol evidence, which the court was ruling at the same time could not in law prove title to real estate. See marg. p. 13, R. And why did not the defendants *demur* to the declaration, and in due place?

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